people or signed letters. *Id.* It is possible, though far from certain, that the campaign committee shield would serve the purpose of preventing the judge or candidate from being personally biased or not open-minded. However, the campaign committee's role does not address the problem of public perception. Crucially, without the limitations imposed by the Solicitation Clause, the candidate could still personally solicit contributions from large groups or by signing letters. This is the backdrop against which the candidate or judge will be viewed by the public at large.

The challenged portions of the Solicitation Clause are finely-tuned to address this specific concern. The Solicitation Clause prevents the appearance of corruption by preventing judges and judicial candidates from engaging in the precise activities most likely to give rise to a public perception of corruption. There is a qualitative difference in appearance between solicitations by candidates and those by committees. Minnesota still allows committees established to support judicial candidacies to raise virtually unlimited funds. The very narrow prohibition of which Appellants complain is directed toward the precise problem identified by the State of Minnesota. Of note, Minnesota also adds the additional protection of precluding campaign committees from informing the candidates of the results of the committee's fund-raising efforts.

In addition, by granting this Petition for Certiorari, this Court has the opportunity to limit the overly expansive reading given to *White I* by the Eighth Circuit and the Eleventh Circuit in *Weaver*. In *Weaver*, 309 F.3d at 1323, the Eleventh Circuit found that Georgia's Solicitation Clause was not narrowly tailored to address Georgia's compelling state interest. It found that because Georgia has judicial elections, it must live with all of the accoutrements of elections, including all aspects of the fundraising.

Id. at 1322. The Eleventh Circuit in *Weaver* expressed a remarkable view of the nature of judicial elections:

> We agree that the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns and during other types of campaigns.

Id. at 1321.

This premise, upon which the Eleventh Circuit's ultimate conclusion in *Weaver* rests, is simply wrong. Unlike elected representatives, judges should not be expected to carry out agendas. Rather, they should consider the cases before them and apply the law to the facts without any unfair biases or evidence of – to use Justice Scalia's term – partiality. The remarkable conflation by the Eleventh Circuit in *Weaver* of judicial elections and elections in general marks an unwarranted expansion of *White I*. Justice Scalia only said that the differences might be exaggerated, a sentiment nowhere seconded in any of the concurring opinions. He nowhere stated that there were no differences.

> [T]he Court in *Weaver v. Bonner* completely recharacterized the [*White*] decision . . . [A] thoughtful reading of *Weaver* suggests that the concept of an impartial and independent judiciary cannot exist if judges remain elected officials. *Weaver* clearly demonstrates the dangers of a liberal reading of the *White* decision, and provides further support for the need to alter state judicial election procedures in the decision's wake.

Chandonnet, B., *The Increasing Politicization of the American Judiciary*, 12 Wm. & Mary Bill Rts. J. 577, 599

(2004); *see also Judicial Campaign Speech Restrictions in Light of Republican Party of Minnesota v. White*, 24 N.Ill.U.L.Rev. 295, 345-46 (2004).

Missouri lawyers are not so pessimistic about judicial elections. There is no reason to travel the road implicitly suggested by the Eleventh Circuit in *Weaver*, i.e., doing away with all judicial elections. The members of The Missouri Bar practice in a state wherein candidates for elected judgeships and those standing for retention in elections have not personally solicited campaigns funds. Members of The Missouri Bar have not observed any serious problems arising from the fact that the members of The Missouri Bar and the state's citizens in general have not received an avalanche of fund-raising letters from judicial candidates who either are or want to be judges. There has also been no suggestion that any sitting judges or persons aspiring to serve as judges have in any way been deprived of a full and fair opportunity to present their cases to voters by the fact that they themselves have been unable to personally solicit funds.

An appropriate analysis of state restrictions on judicial campaign fund-raising can be found in *In re Dunleavy*, 2003 ME 124, 838 A.2d 338 (2003). There, the Maine Supreme Court held that a provision of its judicial code of conduct prohibiting judges from soliciting campaign contributions both furthered a compelling state interest and satisfied strict scrutiny.[3] 838 A.2d at 350-51.

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[3] The Maine Supreme Court also noted that it was possible that strict scrutiny did not even apply to such a restriction, noting that "a restriction on expressive conduct, for which the government's purpose is unrelated to the suppression of expression (a content neutral restriction), need only satisfy the less stringent *O'Brien* four factor test for evaluating restrictions on symbolic speech." 838 A.2d at 350 n. 23.

The Maine Supreme Court noted that the activity prescribed by the Maine provision, which is similar to the prohibition against personal solicitation of campaign contributions in the Minnesota Solicitation Clause, "is exactly [the] activity that potentially creates a bias, or at least the appearance of a bias, for or against a party to a proceeding." *Id.* at 351.

CONCLUSION

The Eighth Circuit failed to consider the public perception of judicial integrity when it invalidated Minnesota's Solicitation Clause. The perception of integrity is vital to ensuring public respect for the judiciary. Minnesota has narrowly tailored the Solicitation Clause to address this compelling state interest. *Amicus Curiae* The Missouri Bar respectfully urges the Court to grant Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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In The Supreme Court of the United States

MARTHA HOLTON DIMICK, CHAIRPERSON, MINNESOTA BOARD ON JUDICIAL STANDARDS, ET AL.,

Petitioners,

vs.

REPUBLICAN PARTY OF MINNESOTA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* STATES OF NORTH DAKOTA, ARKANSAS, CALIFORNIA, COLORADO, OKLAHOMA, OREGON, SOUTH DAKOTA, WEST VIRGINIA AND WISCONSIN IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE*

The States of North Dakota et al., as *amici curiae* ("*Amici* States"), respectfully submit this brief in support of the Petition for a Writ of Certiorari. *Amici* States oppose the decision below of the United States Court of Appeals for the Eighth Circuit, which held that the "solicitation clause" and the "partisan activities" provisions of the Minnesota Code of Judicial Conduct violate the First Amendment to the United States Constitution. *Amici* States urge this Court to grant Minnesota's petition in order to correct the Eighth Circuit's unprecedented decision.

INTEREST OF *AMICI CURIAE*

An independent and impartial judiciary is crucial to maintaining the integrity of governance. Only the judiciary can check executive and legislative encroachment on individual rights. As the State's judicial power uniquely dictates whether the life, liberty and property of its citizens will be preserved or lost, the need for public confidence in the judiciary cannot be overstated. *Amici* States have a compelling interest in ensuring that their judges are free from political and financial ties that threaten their citizens' rights to due process.

Amici States, like most states, subject their judges to periodic elections. *Amici* States come before this Court to represent the interests of their own citizens in ensuring the election of judges in a manner that does not destroy, in fact or appearance, the impartiality of those selected. Applying a strict scrutiny standard that simply could never be met, the Court of Appeals for the Eighth Circuit has created uncertainty and confusion about whether the states can take any necessary steps to preserve the independence and impartiality of judges selected through an elective process. Since the only safe harbor for states under this decision is no regulation at all, states will be forced to either ignore the threats to an independent and impartial judiciary or make themselves targets for litigation.

In a time of growing attacks on judicial independence, states will need to re-evaluate, on an ongoing basis, what measures are necessary to ensure that judges, whether appointed or elected, are capable of fulfilling that countermajoritarian role that is unique to the judiciary. It is imperative that this process move forward with a proper understanding of the legal framework. The Eighth Circuit misapplied *White*[1] and ignored this Court's earlier decisions. The result was not merely an incorrect decision, but one requiring broad and sweeping changes to the way judges are selected. The damage to the integrity of the judiciary in the states will not easily be undone by a correction at a later time. This Court should grant the Certiorari Petition and address these issues which have profound consequences to state judiciaries.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit invalidated two provisions of the Minnesota Code of Judicial Conduct: (1) the "partisan activities" provisions, to the extent they bar judicial candidates from attending or speaking at political party meetings, identifying themselves as members of a political party, and seeking, accepting, or using political party endorsements; and (2) the "solicitation clause," to the extent it prohibits judicial candidates from personally soliciting contributions from large groups and from personally signing letters requesting campaign contributions. Both of these provisions further unusually important state interests.

Minnesota, like many states, provides for the election of judges on a nonpartisan basis. The partisan-activities clause extends the restrictions on political activities by judges to candidates, thereby ensuring that elections for judges remain truly nonpartisan. Of course, maintaining truly nonpartisan elections is not an end itself, but rather is a means by which Minnesota furthers critically important interests. Due process, separation of powers, and public confidence in institutional integrity are interests that are served by a nonpartisan judicial election system. In short, a

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[1] *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

nonpartisan judicial election process fosters an impartial and truly independent judiciary.

The personal solicitation restrictions also further litigants' rig to due process, preserve public confidence in governme and protect the integrity of the election process. Impartiality and independence are again at the heart of the restrictions.

Some states continue to elect judges through fully partisan elections and a few allow relatively unfettered solicitation of money. And it cannot yet be claimed that these states are routinely trampling litigants' rights to due process, do not enjoy some measure of separation between the judiciary and the other branches of government, or have such low public confidence in the judiciary that there is no longer respect for the rule of law.

But it is the inherent uncertainty in such matters and the states' ability to address that uncertainty that is at play in this case. The appearance of a lack of impartiality and independence is as important as its actuality. Where balancing interests constitutionally protected on both sides, states have a strong interest in not having their judgments, based upon long historical experience and practical realities, cast aside. States also have a peculiarly strong interest in defining the degree of independence the judicial branch requires to properly exercise the power of judicial review.

By invalidating the partisan activities provisions, the Eighth Circuit's decision threatens to undermine the states' time-honored efforts to protect judges from the real and perceived risks of partisan politics. By invalidating the solicitation clause, the Eighth Circuit's decision eviscerates the states' ability to address the corrosive effects of money in the unique setting of judicial campaigns.

I. The Court Of Appeals For The Eighth Circuit Has Misapplied This Court's Decision In *White* And Thereby Frustrated The States' Ability To Preserve The Independence And Impartiality Of Judges Selected Through An Elective Process.

This Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765, has led to considerable legal commentary

as well as some judicial consternation. *See, e.g.*, Caufield, *In The Wake Of White: How States Are Responding To* Republican Party Of Minnesota v. White *And How Judicial Elections Are Changing*, 38 Akron L. Rev. 625 (2005); *North Dakota Family Alliance, Inc. v. Bader*, 361 F.Supp.2d 1021, 1041 (D.N.D. 2005) ("To say that there is considerable uncertainty regarding the scope of the Supreme Court's decision in *White* is an understatement.") But however one reads *White*, it is clear that the Eighth Circuit has misapplied the decision.

The Eighth Circuit employed the analysis from *White* in a manner that is contrary to the opinion and results in a fundamental departure from prior precedent of this Court. For example, the Eighth Circuit's analysis cannot be reconciled with *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). Although the Eighth Circuit ignores it in its decision, it would seem that the Eighth Circuit reads *White* as suggesting *Letter Carriers* is no longer sound because the prohibitions at issue (restricting certain partisan activities of federal employees) are wholly underinclusive because employees remain free to join and actively participate in groups like the NRA, NAACP, NOW, and other political action groups.

The Eighth Circuit read *White* to be a far more sweeping opinion than it actually was. In particular, the Eighth Circuit wrongly equated the partisan-activities and solicitation clauses at issue here as equivalent to the announce clause analyzed in *White*; failed to understand the relationship between the challenged clauses and the role of the judiciary; and misread *White* as working a fundamental change in how judicial election restrictions must be analyzed. If left standing, the Eighth Circuit decision will result in fundamental changes not only in the selection process but also in the way the judicial branch relates to the political branches of government and ultimately further erode public confidence in the judiciary.

A. This Court's decision in *White* and the application of traditional strict scrutiny analysis.

The Court in *White* addressed the announce clause of Minnesota's Canons of Judicial Conduct. The prohibition was deemed a content-based restriction on judicial candidate speech – a restriction that all but prohibited speech of any meaningful content. *White*, 536 U.S. at 773. The dissenting opinions focused on the reality (as they saw it) that statements made during a campaign are different from positions taken at other times and therefore must necessarily risk being taken as "[v]ote for me, because I believe X, and I will judge cases accordingly." *White*, 536 U.S. at 800 (Stevens, J., dissenting). Thus, whether one accepted the proposition that speech in the context of a judicial election posed a unique threat to judicial independence or impartiality appeared to have as much to do with the outcome of *White* as any differing view of constitutional doctrine.[2]

Justice Scalia, writing for the majority in *White*, stated that both the Eighth Circuit panel decision and the Minnesota Respondents used the terms "independent" and "impartial" in a way that suggested they were interchangeable. Defining "impartiality" as having three possible meanings – a lack of bias for or against a party, a lack of preconception towards any particular legal view, and having general open-mindedness on legal issues – the Court set the stage for its decision.

The Court concluded that the announce clause was barely tailored at all to preserve the interest in having a judiciary unbiased against particular parties. With the Court's focus on bias for or against a specific party, in the sense that due process would strictly prohibit, the announce clause would appear quite naturally both underinclusive and overinclusive and therefore not narrowly tailored to serve that interest.

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[2] *See* W. Weiser, *Regulating Judges' Political Activity After* White, 68 Alb. L. Rev. 651 (2005).

The Court next turned to the possible interest in having judges without any preconception towards any legal proposition. The Court quickly dispensed with this interest, concluding that it was not even a desirable, let alone compelling governmental interest. "And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either." *White*, 536 U.S. at 778.

Finally, the Court turned to the interest in having a judiciary that is open-minded on legal issues. Although noting that it "may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary," the Court declined to address whether this interest could be sufficiently compelling to justify restrictions on judicial candidate speech. *White*, 536 U.S. at 778. The Court concluded that the announce clause was so woefully underinclusive as to belie any interest in preserving or protecting judicial open-mindedness.

Although purporting to apply this Court's "underinclusiveness" analysis from *White*, the Eighth Circuit misapplied this Court's reasoning in *White* in a way that effectively dooms any attempt by a state to balance the needs of an impartial and truly independent judiciary with an elective selection process.

B. The Eighth Circuit misapplied *White* to the partisan-activities clause.

In its decision, the Eighth Circuit reviewed the partisan-activities clause by employing the same analysis to the same stated justifications articulated in *White*. Thus, the Eighth Circuit focused on judicial bias against litigants and judicial open-mindedness on legal issues as the only possible rationales for the prohibitions at issue.[3]

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[3] In *White*, the court necessarily discussed the proffered state interest in broad terms – judicial open-mindedness – because of how broadly the announce clause operated – prohibiting "a judicial candidate

(Continued on following page)

However, in reviewing the partisan-activities clause, the Eighth Circuit started with an untenable premise that quite clearly foretold the outcome of the case. According to the Eighth Circuit, partisanship is nothing more than a shorthand announcement by association of the views a judicial candidate holds. *Republican Party of Minnesota v. White*, 416 F.3d 738, 754 (8th Cir. 2005) (en banc). If seeking, accepting and using a partisan endorsement amounted to nothing more than publicly stating one's views on the issues of the day, then one might agree with the Eighth Circuit decision. But partisanship is not simply indirectly announcing one's views on legal issues, it is an alignment with political machinery that controls or seeks to control the other two branches of government. To the extent partisan activities announce views on legal issues at all, such activities during a campaign must also certainly announce that one is and will continue to be loyal to a political party.

Unlike announcing one's views on legal issues during a campaign, which the majority in *White* found no more uniquely destructive of impartiality than previous law review articles, judicial decisions, or other earlier statements, the same cannot be said for partisan activities prohibited by Minnesota's judicial canons. A previously politically active judicial candidate's views on legal issues may not change from the views expressed by a political party in the few months he runs for judicial office, but the candidate's "special relationship," real or perceived, with that political machinery is virtually dependent upon the campaign process itself. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 145 (2003). As the dissent in the Eighth Circuit decision explained:

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from stating his views on any specific nonfanciful legal question within the province of the court for which he is running." *White*, 536 U.S. at 773. But to import this broadly stated interest to a far more circumscribed problem surely misses the mark, no less than reviewing a measure with "public safety" as the state interest at play, regardless of what particular aspect of public safety was being addressed.